

G4mecavc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

09 CR 1120 (PKC)

5 HAN CAVAN,

6 Defendant.

7 -----x

8 April 22, 2016
9 11:14 a.m.

10 Before:

11 HON. P. KEVIN CASTEL,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
17 Southern District of New York

BY: EDWARD IMPERATORE

17 Assistant United States Attorney

18 ARNOLD JAY LEVINE

19 Attorney for Defendant

G4mecavc

(In open court)

THE DEPUTY CLERK: United States of America against
Han Cavan.

MR. IMPERATORE: Good morning, your Honor. Edward
Imperatore for the government.

THE COURT: Good morning, Mr. Imperatore.

MR. LEVINE: Good morning, your Honor. Arnold Levine
for Mr. Cavan.

THE COURT: Good morning, Mr. Levine. Good to see
you. Haven't seen you in a while. You don't call. You don't
write. Good to see you, though.

And good morning, Mr. Cavan.

THE DEFENDANT: Good morning.

THE COURT: So I have the motion to dismiss. I have
gone through the relevant case law, *Doggett* and *Barker*, and
there is some agreement between the parties and some
disagreement. But one of the key points of agreement is that
while I can look at the totality of time in considering issues
such as prejudice, the focus of my inquiry is the time period
from the indictment of Mr. Cavan to the September 14, 2012,
request for extradition of Mr. Cavan. What happens afterwards
may be relevant, but that appears to be from the briefing the
focus of the parties' attention.

Do you agree with that, Mr. Levine?

MR. LEVINE: Your Honor, I think my focus was broader,

G4mecavc

1 and that it was -- well, actually, I guess the September 2012,
2 you said, right?

3 THE COURT: Yes.

4 MR. LEVINE: No, I apologize. Yes. That three-year
5 period between the indictment and their request --

6 THE COURT: Thirty-four months I calculated.

7 MR. LEVINE: Yes.

8 THE COURT: Yes. Yes. And I want to in the first
9 instance, I want to hear from the government.

10 So this is a period of delay. It seems to me that is
11 longer than ordinary delay and warrants consideration of the
12 other *Barker* factors. So I want to know what the government's
13 response is, and I want to know whether anybody wants an
14 evidentiary hearing.

15 So let me hear from Mr. Imperatore.

16 MR. IMPERATORE: Your Honor, the Court has before it a
17 very thorough and well developed factual record of the minister
18 in Canada, as well as the Court of Appeals decision, which
19 spell out --

20 THE COURT: Yeah, well, that's all after September 14,
21 2012.

22 MR. IMPERATORE: But that opinion describes for the
23 Court the circumstances of the defendant's incarceration before
24 that.

25 THE COURT: I got that. So why don't you tell me what

G4mecavc

1 the United States was doing between the day of indictment and
2 the day the United States first sought extradition, because
3 that 34-month period and the government's actions during that
4 34 months is a focal point of this motion.

5 And shouldn't it be, Mr. Imperatore?

6 MR. IMPERATORE: Yes, your Honor. But also taken into
7 account are the causes for the defendant's incarceration in
8 Canada. And as we've highlighted in our submission, his
9 incarceration is attributable to his own conduct and his own
10 parole violation.

11 THE COURT: His incarceration in Canada, but that has
12 nothing to do with his extradition, does it?

13 MR. IMPERATORE: It does, your Honor, insofar as --

14 THE COURT: Well, let's say the Canadian authorities
15 did not elect to incarcerate him, and he was at large in Canada
16 but the United States knew exactly where he was in Canada. How
17 would this be any different?

18 MR. IMPERATORE: It would be different, your Honor, in
19 that it's possible under the scenario your Honor has
20 highlighted that he could have arrived in the United States
21 sooner, if the government had pursued him sooner. The
22 difference here is that, as the Canadian court spelled out, he
23 would have been incarcerated in Canada until July of 2015,
24 regardless of when the government sought his extradition.
25 That's under Section 64 of the Extradition Act.

G4mecavc

1 THE COURT: Well, unless the Minister of Justice
2 decides otherwise.

3 MR. IMPERATORE: Correct. Which he did not do in this
4 case.

5 THE COURT: Which he did not, in fact, do. Did the
6 United States ask him to do so?

7 MR. IMPERATORE: I'm not aware that the government
8 did, but I think that's beside the point here, your Honor,
9 because the decision is ultimately up to the minister under
10 Canada's own --

11 THE COURT: So basically what your position is is the
12 diligence, or lack of diligence, of the United States during
13 the 34-month period is utterly irrelevant? Is that your
14 position?

15 MR. IMPERATORE: It's not that it's irrelevant, your
16 Honor. It comes into play under certain of the *Barker* factors.

17 And just to be clear on the government's position, as
18 an initial matter, the cause for the delay and the prejudice
19 suffered favored the government because of the point I just
20 mentioned, which is he would have been incarcerated anyway
21 until July of 2015, regardless of what the government did.

22 But in any event, the government took steps which,
23 under the *Barker* factors and under case law developing *Barker*,
24 were entirely reasonable in the circumstances.

25 THE COURT: Well, the government went to a grand jury

G4mecavc

1 and presented the evidence that it had, and it secured an
2 indictment, correct?

3 MR. IMPERATORE: That's correct.

4 THE COURT: All right. What else did it need that it
5 didn't have at that moment in time to apply to have him
6 extradited?

7 MR. IMPERATORE: Well, as the exchange of drafts,
8 draft extradition requests reflect, there is a heightened
9 standard here for the government to satisfy Canada's demands
10 and to satisfy Canada's questions. Implicit in the exchange of
11 drafts is the notion that Canada has questions about what the
12 government's proof will be.

13 THE COURT: Well, instead of being abstract, tell me
14 specifically, what was it that the government was not able to
15 do at the time of indictment, and how did it later become able
16 to do it? So --

17 MR. IMPERATORE: I'm sorry. Could the government have
18 submitted an extradition request at that moment? Is that --

19 THE COURT: That's essentially the question. Why
20 couldn't the government have sought extradition in
21 November 2009?

22 And then the Minister of Justice might say, you know,
23 waiting until 2015 and the sentence is up is a long, long time.
24 I'm going to allow this person to be extradited to the United
25 States.

G4mecavc

1 MR. IMPERATORE: I think -- I mean, it's theoretically
2 possible that the government could have sought extradition at
3 that time. But the reasons it didn't were reasonable in the
4 circumstances.

5 THE COURT: So tell me what the reasons were.

6 MR. IMPERATORE: So the reasons were, first of all, as
7 under the Extradition Act, he would not have been extradited
8 anyway until July.

9 THE COURT: Well, no, Mr. Imperatore. What I'm asking
10 you to tell me: Are you representing to the Court that the
11 United States Attorney's Office for this district or the
12 Department of Justice made a conscious decision, based upon
13 that statute; that they looked at the statute, they saw this,
14 and then they decided that they were not going to proceed
15 because this was an obstacle; or is this an after-the-fact
16 reconstruction? That's the question I'm putting to you.

17 MR. IMPERATORE: Your Honor, it's difficult for me to
18 answer that question, because I wasn't on this case at that
19 time.

20 THE COURT: I know you weren't.

21 MR. IMPERATORE: But the Court --

22 THE COURT: Have you spoken to the people who were on
23 the case at the time?

24 MR. IMPERATORE: Yes, I have.

25 THE COURT: All right.

G4mecavc

1 MR. IMPERATORE: And it's my understanding from
2 speaking with people who were on the case at the time that they
3 understood that there was no urgency in doing this because he
4 was going to be incarcerated in Canada anyway.

5 But regardless, under the factors, as courts have
6 explained, when the government takes various steps, even in the
7 absence of his being incarcerated, when it takes steps, for
8 example, to develop its proof -- and we're not saying that was
9 the calculus here. But when the government takes steps, for
10 example, to cooperate witnesses, to develop the proof against
11 the defendant, under the *Barker* analysis and under the cases
12 that develop it, that is a valid reason for the delay. And
13 again, we're not saying that that was a conscious calculus on
14 the part of the government, but the government did take those
15 steps. It did proffer with Kaup and Mawhinney. It did
16 exchange drafts of extradition requests that discussed the
17 status of other defendants and what the state of the
18 government's proof was.

19 THE COURT: Exchanged drafts with who?

20 MR. IMPERATORE: With OIA and Washington.

21 THE COURT: So in other words, the government itself
22 internally was exchanging drafts?

23 MR. IMPERATORE: That's correct.

24 THE COURT: And what can you tell me, though -- I
25 mean, the question still remains: What is it that the

G4mecavc

1 government didn't know on the day after indictment that it
2 needed to know? And when did it learn that which it needed to
3 know?

4 MR. IMPERATORE: I don't know the answer to that, your
5 Honor. I think it's hypothetically possible the government
6 could have sought extradition at that time. But under the
7 *Barker* analysis, that's not the relevant question, because the
8 question is whether the government was justified in taking the
9 steps that it did. And in this case it was in light of the
10 findings made by the Canadian court about this --

11 THE COURT: Yes. But when you say "taking the steps
12 that it did," are you talking about efforts to obtain
13 cooperation agreements with codefendants? Is that what you
14 mean by efforts?

15 MR. IMPERATORE: Yes.

16 THE COURT: All right. But is the government telling
17 me that the delay is justified because there was a perceived
18 need to secure that cooperation before they could apply for
19 extradition?

20 MR. IMPERATORE: That is an independent reason for
21 justification, your Honor. But even assuming the government
22 never did anything, even assuming the government --

23 THE COURT: Never mind about assuming they never did
24 anything. Did the government make a conscious decision to not
25 apply for extradition because it didn't feel it had adequate

G4mecavc

1 information to do so and needed to at least attempt to secure
2 the cooperation of an additional witness?

3 MR. IMPERATORE: Your Honor, my understanding from
4 speaking with people on the case at the time was that the
5 government didn't see any urgency in seeking extradition
6 because the defendant would have been incarcerated until
7 July 2015 anyway.

8 THE COURT: Well, I don't mean to give you a rough
9 time, Mr. Imperatore. I'm going to take that answer as a no to
10 my question, then?

11 MR. IMPERATORE: Whether the government felt it needed
12 to cooperate people in order to submit the extradition request?

13 THE COURT: Correct.

14 MR. IMPERATORE: I believe it was a factor, but it's
15 difficult for me to represent that, your Honor, because I
16 wasn't there myself, and I wasn't the one making the decision.

17 THE COURT: All right. So, did the government obtain
18 this cooperation?

19 MR. IMPERATORE: No.

20 THE COURT: Well, how did it make an extradition
21 request, then?

22 MR. IMPERATORE: Well, it made an extradition request
23 based on the information that it had.

24 THE COURT: And the information it had, it had at the
25 time of indictment?

G4mecavc

1 MR. IMPERATORE: That's correct. But under the *Barker*
2 analysis, it's irrelevant at the end of the day, your Honor,
3 because he suffered no prejudice from this. And the delay
4 wasn't attributable to the government. It was attributable to
5 the defendant's own conduct in violating the terms of his
6 parole.

7 And as the Court in Canada explained, his parole
8 violation was based not only on the conduct that underlies the
9 indictment; it was also based on his association with known
10 drug dealers, which in and of itself is an independent reason
11 for a parole violation.

12 What's also significant here, and it's clear and
13 undisputed from the Canadian record, is that the defendant
14 never took any steps to challenge his parole violation. He
15 never took any steps to review that decision that he would be
16 incarcerated until July of 2015.

17 THE COURT: Tell me more about how -- is it the
18 Minister of Justice? -- exercises the discretion to honor or
19 not honor an extradition request before the expiration of the
20 Canadian sentence?

21 MR. IMPERATORE: Yes. What the opinion says --

22 THE COURT: It's the Minister of Justice?

23 MR. IMPERATORE: Yes, your Honor. That's I believe
24 under Section 64 of the Extradition Act. And this is at page
25 30 of the Court's decision, which is at Tab A. It indicates

G4mecavc

1 that the surrender does not take into effect -- excuse me, a
2 surrender order does not take effect until after the person has
3 been discharged, whether by expiry of the sentence or
4 otherwise.

5 So what it's saying is even regardless of when the
6 Canadian court enters that surrender order, he's got to serve
7 his full sentence.

8 THE COURT: Well, that's not what I understand you to
9 have said previously or -- my understanding of it at all. I
10 understood that under the Canadian statute, the Minister of
11 Justice had discretion under the Canadian Extradition Act SC
12 1999, Chapter 18, Section 64. The sentence needs to be served
13 in its entirety, quote, unless the minister orders otherwise,
14 closed quote.

15 So, what can you tell me about the exercise of
16 discretion by -- again, the question I asked you before was,
17 this is the Minister of Justice, is that correct?

18 MR. IMPERATORE: That's my understanding, your Honor.

19 THE COURT: Okay. Tell me about how that discretion
20 is exercised. And is this something, does the United States
21 request that the Canadian Minister of Justice exercises
22 discretion in one way or another? Do they urge upon the
23 Minister of Justice that he exercises discretion? Or does the
24 United States remain mute on this? And I assume the United
25 States has a track record in other extradition proceedings.

G4mecavc

1 Did they usually ask for the minister to order otherwise? Does
2 the minister usually grant that request, or does he usually
3 deny it, or always deny it, or always grant it? What can you
4 tell me?

5 MR. IMPERATORE: It's my understanding, your Honor,
6 from speaking with the Office of International Affairs in
7 Washington that the Justice Department typically does not ask
8 the minister to request -- does not ask him to exercise his
9 discretion in any particular way, and that the discretion is
10 his alone to decide how to exercise.

11 THE COURT: Do you have an affidavit from anyone
12 within this office that so states?

13 MR. IMPERATORE: I do not. But I think that the
14 issue, though, your Honor, when the Court looks at it from the
15 perspective of the *Barker* factors, it's a distinction without a
16 difference, because even if the Justice Department had asked
17 the minister to exercise his discretion in a particular way,
18 it's his discretion alone.

19 THE COURT: Correct.

20 MR. IMPERATORE: He has given his reasoning for why
21 the defendant should be incarcerated until the time that he
22 was.

23 And we also make clear critically that it wasn't
24 because these charges were handed down that he violated his
25 parole. There was two separate bases for that. And that's

G4mecavc

1 something that the Court should consider as well when
2 evaluating the reason for the delay, as well as the prejudice,
3 any prejudice that was suffered.

4 THE COURT: Was there evidence that the Minister of
5 Justice did consciously exercise discretion and exercise
6 discretion to deny an otherwise order?

7 MR. IMPERATORE: I don't know the answer to that, your
8 Honor.

9 THE COURT: Well, then, how do we know how the
10 Minister of Justice would have acted?

11 MR. IMPERATORE: Well, I mean, it is apparent from
12 what he wrote, from what the minister wrote, that he understood
13 he had the discretion. So I think it's implicit --

14 THE COURT: All right.

15 MR. IMPERATORE: -- in his rendering that decision
16 that he decided not to exercise his discretion.

17 THE COURT: And where do I find the Minister of
18 Justice's statement?

19 MR. IMPERATORE: It's in different places in -- it's
20 embedded in the opinion of the Court of Appeal at Exhibit A.
21 And there are block quotes, quotations from it. I can pull
22 some quotations that are relevant to the Court's question, if I
23 may have a moment.

24 This is at page 30, your Honor. There's a block
25 quote. This is at Tab A of the government's brief. The

G4mecavc

1 minister writes in his opinion -- it's quoted by the Court of
2 Appeals -- with respect to your submission that Canadian
3 authorities did nothing to advance this matter while the
4 pending US charges prevented Mr. Cavan from being released on
5 parole, I note that an earlier extradition request would not
6 have changed the fact that US charges would still have been
7 pending until at least such time as Mr. Cavan was surrendered
8 to the United States. With respect to persons sought serving
9 sentences in Canada, I note that Section 64 of the Act provides
10 that unless I order otherwise, a surrender order does not take
11 effect until after the person has been discharged, whether by
12 expiry of the sentence or otherwise.

13 So it's clear from this passage that the minister
14 understood that it was he who had the discretion to order it,
15 and that he had made a decision not to exercise it in that
16 fashion.

17 THE COURT: Tell me the sequence of events after the
18 application was made that demonstrates that the minister did
19 not so exercise his discretion. In other words, the
20 application comes in in September 2012, and what happens then?
21 Did they put it on a shelf and say, well, he's got some time
22 that he owes us; we're not going to do anything with this?
23 What did the Canadian authorities do?

24 MR. IMPERATORE: May I have a moment, please.

25 THE COURT: Yes. Well, I probably could read papers,

G4mecavc

1 too, but that's -- you can have a moment.

2 MR. IMPERATORE: I'm sorry, your Honor. I just want
3 to be correct on the dates.

4 THE COURT: Go ahead. Take your time.

5 MR. IMPERATORE: So the minister ordered -- my
6 understanding is that there was briefing on this issue. So
7 three months after -- this is at page six -- three months after
8 the formal extradition request, there was an authority to
9 proceed issued under the extradition request. And then he was
10 formally arrested pursuant to that on March 1st of 2013.

11 THE COURT: Taken into custody?

12 MR. IMPERATORE: Taken into custody.

13 THE COURT: Right.

14 MR. IMPERATORE: And then he spent much of the next of
15 the -- and then after briefing, the minister ordered his
16 surrender for extradition on December 12th of 2013.

17 THE COURT: Ordered his surrender for extradition?

18 MR. IMPERATORE: Yes.

19 THE COURT: So in other words, now, this is
20 interesting -- is this what you're telling me, that everything
21 was complete on the extradition as of -- give me the date again
22 in 2013.

23 MR. IMPERATORE: So my understanding is the minister
24 ordered Cavan surrender for extradition to the United States on
25 December 12th of 2015. But -- then this is at page 30 -- the

G4mecavc

1 minister found that pursuant to the Canadian Extradition Act,
2 Section 64, he would be imprisoned in Canada until July 25th of
3 2015, which is his parole expiry date regardless of when he had
4 issued an order of extradition. In other words --

5 THE COURT: So let me see. You apply for extradition
6 in the fall of 2012, but an order of extradition was not issued
7 until about six months after he completed his Canadian
8 sentence, is that correct?

9 MR. IMPERATORE: No, your Honor. His Canadian
10 sentence was completed in July of 2015.

11 THE COURT: Yes, well, you just said December 12,
12 2015, order for surrender --

13 MR. IMPERATORE: I'm sorry. December 12th of 2013.

14 THE COURT: Okay. All right. Well, that's an
15 important difference.

16 So, there was a piece of paper in existence
17 December 2013 that in essence granted the extradition request;
18 is that correct?

19 MR. IMPERATORE: Yes, that's my understanding. But
20 what it also says is he's still going to remain in custody --

21 THE COURT: I got that part.

22 MR. IMPERATORE: Yes.

23 THE COURT: I got that part.

24 So in other words, all proceedings associated with the
25 extradition were concluded by December 12, 2013, and the only

G4mecavc

1 thing remaining then was for the passage of time and for
2 Mr. Cavan to finish his Canadian time?

3 MR. IMPERATORE: Yes. But during that period Cavan
4 was also challenging the surrender order.

5 THE COURT: I have it. I have it. But it was a final
6 order, subject to review and appeal, and all of that as of
7 December 12, 2013?

8 MR. IMPERATORE: Yes.

9 THE COURT: All right. Let me hear from Mr. Levine.

10 MR. LEVINE: Your Honor, if I can, I'll start with
11 that very last point, because I submitted with my papers the
12 letter from the Minister of Justice himself, rather than have
13 it be sort of two -- you know, two times removed by what
14 somebody else is saying the Minister of Justice said.

15 The Minister of Justice sent a letter to my client's
16 counsel in Canada explaining what the process was and what had
17 happened and what his findings were. And that was in 2013.
18 The Minister of Justice said, I'm ordering that he be turned
19 over to the US. He doesn't say in that letter, only after he
20 finishes his sentence in 2015.

21 In response to the Minister of Justice's order,
22 Mr. Cavan's counsel challenged that. And the basis for the
23 challenge was the delay itself. That was a large part of the
24 basis for the challenge, was that the US had taken three years
25 to do that. And then in response to that, the Canadian

G4mecavc

1 Minister of Justice -- Canadian authorities then contacted the
2 US. And that's why the letter from the office of international
3 whatever -- I'm, sorry whatever it's called -- the letter
4 included by the government in their response --

5 THE COURT: OIA, I think it is, something like that.

6 MR. LEVINE: Right.

7 That letter was in response to that. That letter
8 where they explain what they were doing in the meantime, why
9 they're delaying, was in response to the Canadian authority's
10 request in trying to litigate my client's argument that he
11 shouldn't be extradited because the US had taken three years
12 even to request it. And so there's nothing in the minister's
13 letter that says, I'm deciding it now, I'm ordering him to be
14 surrendered, however, this will not take effect for another two
15 years. There's nothing in that letter saying that.

16 But what happens right on top of that, or really was
17 part of that process, was that my client then was appealing it.
18 So it wasn't as if the Minister of Justice ordered the
19 surrender and then nothing happened for two years, waited until
20 sentence to expire and then he was surrendering.

21 THE COURT: I got that. But now this is at least
22 interesting to me. It may or may not be relevant, but now take
23 me through: When did the appeals expire?

24 MR. LEVINE: The appeals I believe expired after
25 actually his sentence was completed already. And then right

G4mecavc

1 after the appeal, he was returned to the US.

2 THE COURT: So when did this sentence expire?

3 MR. LEVINE: That was in July 2015? November 2015.
4 July 2015. And he was returned --

5 THE COURT: And then when did the appeals expire?

6 MR. LEVINE: That was with the decision that's part of
7 the record that both I and the government both submitted with
8 our papers, denying Mr. Cavan's appeal.

9 THE COURT: That would be October, then, is that --

10 MR. LEVINE: That sounds right. October 2015, right.
11 And then he was extradited in November, November 2015, just a
12 month later.

13 THE COURT: All right.

14 MR. LEVINE: Or not even a month.

15 THE COURT: Okay.

16 MR. LEVINE: Judge, I know that the government also
17 keeps talking about him being imprisoned in Canada through
18 fault of his own, because of his conduct. That was the subject
19 of this indictment. And the only way the Canadian authorities
20 became aware of it was because the US, after getting an
21 indictment, instead of requesting his extradition, just told
22 the Canadian authorities that there was an indictment and had
23 him locked up instead.

24 THE COURT: What were they? Who had him locked up?

25 MR. LEVINE: US contacted Canadian authorities to

G4mecavc

1 inform them, to inform the Canadian authorities that they had
2 an indictment and who his codefendants were on the indictment.
3 That's what led to his being locked up on parole violences.

4 THE COURT: I understand that. I understand that.

5 But it was the Canadians who decided to lock him up?

6 MR. LEVINE: Right. Of course, the US didn't -- could
7 have just requested extradition at that point also instead of
8 just -- instead of saying, here are these violations.

9 THE COURT: But the flip side of that story is the US
10 says, now aware that the Canadians are holding him, the
11 exigency changes, they say, because they knew he was going to
12 be subject to being held all the way through to July of 2015.

13 MR. LEVINE: Actually, Judge, the letter by OIA in
14 response to the Canadian authorities' request says that they
15 started their process when they realized that Mr. -- I believe
16 that Mr. Cavan was going to be due to be released in
17 September 2013.

18 THE COURT: All right.

19 MR. LEVINE: Not 2015. At the time that the US
20 started their process, they didn't think he was going to be
21 released in 2015. They thought he was going to be released in
22 2013.

23 THE COURT: What happened that caused it to move from
24 2013 to 2015?

25 MR. LEVINE: Well, I don't really know from the

G4mecavc

1 papers. All the papers I have, I don't know how that Canadian
2 system worked and whether he was eligible for parole really in
3 2013 or whether he necessarily had to wait until 2015, whether
4 he would have been eligible for parole again during that time.

5 And I don't know -- and I couldn't tell whether -- and
6 certainly, as your Honor noted, the Minister of Justice as
7 requested could have ordered his release at any time.

8 THE COURT: But just being fair to the record here,
9 the application for extradition was made in the fall of 2012.
10 So the government says, gee, we were in no rush up to that
11 point because we thought he was going to be held. Now, whether
12 they thought he was going to be held until September 2013 or
13 September 2014 or July 2015, that, they say, helps them on why
14 it wasn't filed until 2012; and that whether their expectation
15 was his release in September 2013 or July 2015 would be --
16 would sound like it would be immaterial.

17 MR. LEVINE: Well, it's not, because as your Honor
18 noted, the Minister of Justice had the discretion to order him
19 released and surrender to the US before the expiration of his
20 term, whether it be September 2013 or July 2015. And the
21 government --

22 THE COURT: Do you have any evidence that the Minister
23 of Justice exercises his discretion in extradition cases to
24 release people earlier to the United States?

25 MR. LEVINE: I don't have that. Of course I don't

G4mecavc

1 have the resources that the government does. They would be the
2 ones who know, who would have direct knowledge of their
3 relationship with the Canadian authorities.

4 But without having asked the Canadian authorities to
5 do it, and without being denied by the Canadian authorities,
6 the government has no argument that their efforts would have
7 been futile. And that's what they have to show.

8 THE COURT: Well, is it a matter appropriately sought
9 by the foreign government, or is it a matter appropriately
10 sought by maybe a Canadian diplomatic official?

11 Or Mr. Cavan himself, presumably, could have said,
12 stop the madness here. I want to be back in the United States
13 to promptly address these charges, and I urge you to exercise
14 your discretion so that I may do that. I mean, that was open
15 to Mr. Cavan.

16 MR. LEVINE: Well, Mr. Cavan couldn't ask to be
17 extradited before the government made a request for the
18 extradition in September 2013.

19 THE COURT: No, he couldn't. He couldn't.

20 But once the order was made in I think it was
21 December 12, 2013, he could have asked the Minister of Justice
22 to please exercise his discretion and let me go to the United
23 States to fight these charges. Correct?

24 MR. LEVINE: Conceivably. However, he litigated the
25 issue based on the delay itself, which was three years before

G4mecavc

1 the government made their request.

2 And also, your Honor, as your Honor noted from the
3 beginning, the point in time that's really being litigated here
4 is those first three years, not what happened after, after the
5 government made their request.

6 THE COURT: Now, let me just make sure I -- because
7 chronology here is very important. How long after the
8 November 19, 2009, indictment did the Canadian authorities take
9 Mr. Cavan into custody?

10 MR. LEVINE: I believe it was November. Again, that's
11 I think also in the Court of Appeals decision.

12 THE COURT: So it's the same month essentially?

13 MR. LEVINE: Yes. Within a very short time, it seems,
14 the US got the indictment, notified Canadian authorities about
15 the indictment, and that resulted in Mr. Cavan being locked up
16 in Canada for the conduct related to that indictment.

17 It also, your Honor, I think should be noted in terms
18 of how the Minister of Justice may have exercised discretion in
19 the case had the government requested, it's important to note
20 the sentence he was serving in Canada was not for committing a
21 Canadian crime. It wasn't a sentence imposed by a Canadian
22 court. It was a sentence imposed by a United States District
23 Court for the District of Minnesota for a crime committed in
24 the United States against the United States. He was serving it
25 in Canada solely due to another treaty regarding transfer of

G4mecavc

1 prisoners.

2 THE COURT: I understand.

3 MR. LEVINE: So Canada's interest in keeping him,
4 holding him there to the expiration of his sentence, very good
5 chance that would have given way to the US, if the US requested
6 that its own sentence be terminated early so that they can get
7 him to try him on a different case.

8 THE COURT: Well, I don't expect anyone in this
9 courtroom to be an expert on Canadian law. But one would think
10 in a common law system that when the grant of extradition was
11 made in December, or the order for surrender for extradition
12 was made in December of 2013, that unless there was a stay in
13 place, what was holding him back from being extradited was the
14 sentence.

15 So, you know, there can be a statutory stay or a
16 rule-based stay or a discretionary stay, if it's as a result of
17 the ongoing challenge or -- was that the case? Or was it
18 because he was in custody by reason of the parole violation
19 that caused reasonable lawyers to not trifle with the question
20 of a stay because he's in custody, he's not going anywhere so
21 there's no need to ask a Canadian judicial body for a stay?
22 Can you shed any light on that question?

23 MR. LEVINE: I don't know whether a stay was
24 specifically requested or whether it was necessary to request
25 it, given that the appeal had been taken from --

G4mecavc

1 THE COURT: I'm just thinking in our system, it
2 probably would be necessary. You know, now, it could be that
3 an official exercises discretion not to execute the -- I don't
4 know. But it wouldn't necessarily just happen in our system by
5 the mere election of the party who's the subject of the order.
6 To file a notice of appeal would not give them any rights to
7 remain, I don't think, unless there's a statute or rule that
8 provided it.

9 MR. LEVINE: I can certainly try to look into that,
10 Judge. I can try to contact my client's counsel from that case
11 again and ask whether a stay was required or requested. As I
12 said, I don't know whether it was. We just know that the
13 challenge was taken, and that within a month after he lost the
14 challenge, he was in the US.

15 THE COURT: Right. All right. I am going to allow
16 each side to make a supplemental submission in the next --
17 would it be convenient to say the next 14 days?

18 MR. LEVINE: Judge, I apologize for cutting you off.
19 I'm starting a homicide trial in Manhattan state court on
20 Tuesday, which will make it very difficult for me to get in a
21 supplemental briefing on this in the next 14 days.

22 THE COURT: All right. So when do you propose?

23 MR. LEVINE: That trial I expect to last two to three
24 weeks.

25 THE COURT: When do you propose, Mr. Levine?

G4mecavc

1 MR. LEVINE: Closer to the end of May.

2 THE COURT: Any objection from the government?
3 They'll be simultaneous.

4 MR. IMPERATORE: No, your Honor.

5 THE COURT: So May 27th. And I will set a further
6 conference in this case -- would it be convenient and
7 appropriate to do that on June 24th, perhaps 2:30 p.m.?

8 MR. LEVINE: That's fine for me.

9 THE COURT: All right. And the thought would be that
10 I would have a decision out either granting the motion -- or if
11 I have a decision out denying the motion, then we would take up
12 next steps on June 24.

13 MR. LEVINE: We said 2:30 on the 24th?

14 THE COURT: 2:30.

15 MR. IMPERATORE: Your Honor, if it would be helpful to
16 the Court, I just wanted to briefly address a couple points
17 raised by counsel.

18 THE COURT: Sure.

19 MR. IMPERATORE: So first of all, the Court had asked
20 questions about the relevant date of the extradition order,
21 taking into effect. The minister made clear in his decision
22 that while he entered the surrender order in 2013, it would not
23 go into effect until July of 2015.

24 THE COURT: When did he make -- did he make that clear
25 in 2013?

G4mecavc

1 MR. IMPERATORE: It appears so, your Honor. This is
2 at page 30 of the Court of Appeal brief quoting the minister,
3 saying, a surrender order does not take effect until after the
4 person has been discharged, whether by expiry of the sentence
5 or otherwise.

6 Secondly, counsel has made arguments about whether --

7 THE COURT: Did he reference the release date?

8 MR. IMPERATORE: Yes. July 27, 2015.

9 Secondly --

10 THE COURT: Well, that, I think, is -- maybe I don't
11 need anything. I'm happy to take something supplemental, but I
12 think that's the answer to the question I was asking.

13 Mr. Levine?

14 MR. LEVINE: I'm sorry, Judge. I don't think it is,
15 because it's just continued reference to or otherwise means
16 that he knows that it doesn't have to be that date.

17 THE COURT: No. This is the man with the discretion
18 saying it.

19 MR. LEVINE: Right. But this is something being
20 quoted, something later on from the Court of Appeals decision.
21 The Minister of Justice never says in 2013 that he will not be
22 released until July 2015. He says -- his sentence expires
23 then. That's when he would be surrendered or -- or the end of
24 his sentence or otherwise, meaning I still have discretion.
25 The government, US government, never asked him apparently to

G4mecavc

1 exercise that discretion, never asked for him sooner.

2 THE COURT: We talked about that before. But the fact
3 of the matter -- I'll take a look at it.

4 Does the government have a copy of the order?

5 MR. IMPERATORE: Well, it's not --

6 THE COURT: I know it's quoted. I got the part that
7 it's quoted.

8 Do you have a copy of the order?

9 MR. IMPERATORE: I can look for it, your Honor. I
10 don't know whether I have it, but I'd be happy to provide it.

11 THE COURT: Okay.

12 MR. IMPERATORE: And he did indicate the date, and he
13 did indicate that it was not apparent that an earlier
14 extradition request would have resulted in an earlier release,
15 which the government submits is dispositive of this issue. And
16 not to belabor the point, your Honor. I just want to clarify a
17 couple of other points.

18 First of all, the Court has a very thorough record
19 before it from the Canadian court -- this is at pages 10 and 25
20 of its opinion -- saying explicitly that, quote, Cavan has not
21 presented any evidence to suggest that the US authorities were
22 involved in the parole suspension or revocation proceedings in
23 Canada, other than to provide information. And it goes on to
24 say that the parole board played an inquisitorial function and
25 explained it relies on various information.

G4mecavc

1 And then secondly, the Court had asked about the issue
2 of the stay. The Canadian court, in finding that there was no
3 prejudice to Cavan, observed and highlighted that Cavan could
4 have sought review of his parole revocation and never did that.
5 He could have done that. That was at his disposal. He never
6 sought to challenge it.

7 THE COURT: All right. Mr. Levine, let me give you
8 the last word, if there's anything you wanted to say.

9 MR. LEVINE: Just one thing, Judge, which is the part
10 quoted by the government, saying it's not apparent an earlier
11 request would have granted, I think actually favors my
12 position; because they're not saying that an earlier request
13 would have been futile. And I think that's a very important
14 distinction. They leave open the possibility an earlier
15 request would have been granted. There is just at this point
16 no way to -- they were in a position to know whether it
17 actually would have happened, but they do acknowledge it could
18 have been and might have been, and that a request by the
19 government would not have been futile.

20 THE COURT: Thank you.

21 MR. LEVINE: I was just going to ask whether I can get
22 the minutes of this proceeding.

23 THE COURT: Absolutely. Submit proper vouchers and
24 that will be fine.

25 MR. LEVINE: Thank you.

G4mecavc

1 THE COURT: All right. And let me hear the
2 government's application.

3 MR. IMPERATORE: Your Honor, the government moves to
4 exclude time between today and June 24th to allow the parties
5 to file any supplemental submissions, for the Court to resolve
6 the motion and to allow the parties to discuss a potential
7 disposition.

8 THE COURT: All right. Mr. Levine, any objection?

9 MR. LEVINE: No, your Honor.

10 THE COURT: I find that the ends of justice will be
11 served by granting a continuance to June 24th, and that the
12 need for a continuance outweighs the best interests of the
13 public and the defendant in a speedy trial. The reasons for my
14 finding are that the time is needed to enable the parties to
15 address the issues arising out of today's proceeding and to
16 accommodate Mr. Levine's trial schedule in another case.

17 And accordingly, the time between today and June 24th
18 is excluded under the Speedy Trial Act.

19 MR. IMPERATORE: If I may, your Honor. I just want to
20 inquire if there are any particular points that the Court would
21 like the parties to address in light of the proceedings today.

22 THE COURT: Well, you'll have a transcript. The Court
23 has focused everyone's attention on what its concerns are, and
24 I'm not requiring you to make a submission beyond.

25 I do require you to get me or make best efforts to get

G4mecavc

1 me the Canadian Minister of Justice determination, which I
2 would like to review in full or a copy of the original. Beyond
3 that, you're free to submit nothing, if you choose to.

4 MR. IMPERATORE: I understand, your Honor. We will
5 make efforts to get the Court that opinion.

6 THE COURT: Okay. Thank you very much. We're
7 adjourned.

8 (Adjourned)